

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENAN BARCLAY,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 228559
Wayne Circuit Court
LC No. 98-012335-04

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE L. DARRISAW,

Defendant-Appellant.

No. 228560
Wayne Circuit Court
LC No. 98-012335-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WALKER,

Defendant-Appellant.

No. 228561
Wayne Circuit Court
LC No. 98-012335-01

Before: White, P.J., and Kelly and R.S. Gribbs, * JJ.

PER CURIAM.

Following a joint bench trial, defendants Kenan Barclay, Jimmie Darrisaw, and Michael Walker were each convicted of kidnapping, MCL 750.349, and extortion, MCL 750.213. Defendants Darrisaw and Walker were also each convicted of carjacking, MCL 750.529a, and defendant Darrisaw was also convicted of possession of a firearm during the commission of a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

felony, MCL 750.227b. Barclay was sentenced to concurrent prison terms of twelve to twenty-four years for each conviction. Walker was sentenced to concurrent prison terms of fifteen to thirty years for each of his convictions. Darrisaw was sentenced to concurrent prison terms of fifteen to thirty years each for the kidnapping, carjacking and extortion convictions, and a consecutive two-year term for the felony-firearm conviction. All three defendants appeal as of right. We affirm.

Following defendants' trial, the trial court verbally announced its verdict, findings of fact, and conclusions of law from the bench in compliance with MCR 6.403, but the stenographic record of the February 28, 2000, proceeding was lost or misplaced and is unavailable. All three defendants now contend that they are entitled to a new trial because the absence of the transcript precludes meaningful appellate review of their claims. We disagree.

Whether the unavailability of a trial transcript denies a defendant his due process right to proper appellate review is a constitutional issue which this Court reviews de novo on appeal. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). A criminal defendant's constitutional right to an appeal may be impaired if the lower court record is either missing or incomplete, and if the omitted material precludes us from effectively evaluating the defendant's claims on appeal. *People v Frechette*, 380 Mich 64, 73; 155 NW2d 830 (1968); *People v Horton (After Remand)*, 105 Mich App 329, 330; 306 NW2d 500 (1981). However, a defendant is not entitled to an automatic reversal. *People v Iacopelli*, 141 Mich App 566, 568; 367 NW2d 837 (1985). The defendant's right is satisfied if the surviving record is sufficient to allow evaluation of the defendant's claims on appeal. *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983); *People v Wilson (On Rehearing)*, 96 Mich App 792, 797; 293 NW2d 710 (1980).

In the instant case, the reconstructed record is sufficient to review defendants' claims, which question whether the trial judge erred in finding sufficient evidence to support their convictions. To a large extent, "[t]he sufficiency of the record depends on the questions that must be asked of it." *Audison, supra*, 126 Mich App 835. Here, all three defendants argued below that identification was the sole issue in this case. Two of the three eyewitness victims testified, one adult and one child. The third victim was an infant. The trial judge, Judge David Kerwin, stated on the record that he had a clear memory of the case because of the unusual facts and because it was his last trial. The trial judge also recalled that he believed the identifying witnesses. Defendants have not overcome the presumption of regularity that attached to the trial court's reconstruction proceedings. *Iacopelli, supra*, 141 Mich App 567-568. Accordingly, a new trial is not warranted. *Audison, supra* 126 Mich App 834-835; *Horton, supra*, 105 Mich App 331.

We note that Walker and Barclay have not alleged any inconsistency between the lost original findings and the reconstructed findings, nor have they specified any occurrence of prejudice. Darrisaw argues that the reconstruction is inadequate because Judge Kerwin mistakenly stated that the adult victim saw Darrisaw back her Jeep out of the driveway when in fact she identified Walker as the driver, and further, because Judge Kerwin recalled that he had doubts about the child victim's testimony, but he did not specify what those doubts were. These arguments are not pertinent to the question of whether the record is adequate to allow for appellate review. Judge Kerwin's reconstructed findings satisfy MCR 6.403, and reflect that he was aware of the issues and correctly applied the law. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

Barclay and Walker both argue that the successor trial court erred in allowing Judge Kerwin to review the trial transcripts prior to issuing his reconstructed findings. They argue that this procedure is contrary to MCR 7.210(B)(2). We find no error. None of the defendants filed a proposed statement of facts as required by the court rule or raised any controversy regarding the trial court's reconstruction. None of the defendants, either in the trial court or on appeal, have contended that there was a discrepancy between Judge Kerwin's original findings and reconstructed findings. Nothing in MCR 7.210(B)(2) precludes a trial court from reviewing the record in the course of preparing a settled statement of facts, and Barclay and Walker have not shown any prejudice arising from Judge Kerwin's review of the transcripts.

We also reject Barclay's and Walker's argument that Judge Kerwin's use of the transcripts elevated him to the role of an appellate judge. Judge Kerwin stated that he used the transcripts only to refresh his memory about the chronology of events, and that he had a good memory of the trial. The primary fact issue to be resolved in this case was the witnesses' credibility in identifying their kidnappers. Evaluation of a witness' credibility is a highly subjective determination, depending more on factors such as the witness' demeanor than words. *People v Dye*, 431 Mich 58, 65; 427 NW2d 501 (1988); *People v Sammons*, 191 Mich App 351, 365; 478 NW2d 901 (1991).

All three defendants argue that the evidence was insufficient to support their convictions. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a rational trier of fact to find guilt beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

Defendant Barclay contends that the evidence was insufficient because the adult victim's testimony failed to establish his participation in the crime. We disagree. The adult victim testified that Barclay was the person who drove past her and blew his horn, in accordance with the kidnappers' pre-arranged signal that the children were free. Judge Kerwin found that the defendants aided and abetted each other in the commission of the crimes. A conviction of aiding and abetting requires proof that (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999); MCL 767.39. The adult victim's testimony that Barclay aided the kidnappers by giving the signal is sufficient to support these elements.

Barclay also argues that Judge Kerwin's findings were inadequate. As noted previously, a trial court's findings of fact under MCR 6.403 are sufficient if it appears that the court was aware of the issues and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). As we have stated, it is clear that Judge Kerwin was aware that the primary issue was whether the witnesses correctly identified Barclay and the other codefendants as participants in the charged offense. Although Judge Kerwin did not mention Barclay by name or specify what role he played in the crimes, it is nonetheless clear from his findings that he

believed the adult victim correctly identified the defendants and that the child victim's testimony, though insufficient by itself, lent support and credence to the adult witness' testimony. It is also clear that the trial judge found that all three defendants (plus McCord, a codefendant who was tried separately) cooperated with each other to perpetrate the crimes. The findings were sufficient.

Finally, Barclay argues that the trial court erred in finding that the adult victim was a credible witness because she contradicted her own preliminary examination testimony and because her testimony was in conflict with portions of the child victim's testimony. This Court gives special deference to a trial court's findings on witness credibility. *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000). Despite the inconsistencies in the trial testimony—which Judge Kerwin acknowledged—Judge Kerwin's findings that the adult victim's testimony was reliable and that the child victim's testimony served as support and corroboration were not clearly erroneous. *In re Forfeiture of \$25,505*, 220 Mich App 572, 581-582; 560 NW2d 341 (1996).

Defendant Darrisaw's insufficiency claim is based principally on the argument that Judge Kerwin erred in finding that the adult victim identified him as a perpetrator beyond a reasonable doubt. Like Barclay, he predicates this argument on inconsistencies in the adult victim's and the child victim's testimony. He also points out that Judge Kerwin erroneously stated that the adult victim saw Darrisaw's face as he backed her Jeep out of the driveway when, in fact, she testified that Walker was the driver. As discussed previously, this Court defers to a trial court's assessment of witness credibility, notwithstanding discrepancies and conflicts in the trial testimony. *Sherman-Huffman*, *supra*, 241 Mich App 267; *In re Forfeiture of \$25,505*, *supra*, 220 Mich App 582. Judge Kerwin's erroneous statement about Darrisaw is not material. This statement was made in the context of a general discussion that the adult victim's identification testimony was reliable because she had an adequate opportunity to observe the kidnappers. It was not intended as a specific finding about Darrisaw's conduct. Accordingly, the misstatement does not constitute a clearly erroneous finding of fact. MCR 2.613(C); *Hermiz*, *supra*, 235 Mich App 255.

Darrisaw also argues that the adult victim's in-court identification of Darrisaw was not reliable because it did not satisfy the eight factors set forth in *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998). Darrisaw's reliance on *Gray* is misplaced. The *Gray* case involved a sexual assault victim's in-court identification of the defendant after a police officer had used an unduly suggestive, improper photographic identification procedure. *Gray* is inapplicable here because there is no claim of an improper or unduly suggestive pretrial identification procedure. Accordingly, there was no need to establish an independent basis for the in-court identification. Instead, the credibility and reliability of the adult victim's identification of Darrisaw was a question of fact for the trial court to decide. *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995).

Darrisaw also argues that the prosecution failed to prove that he committed extortion because there was no evidence that he communicated a threat to the adult victim. Extortion involves an oral or written communication of a threat to injure the victim, the victim's property, or the victim's parent, spouse or child, made to extort money, or a pecuniary advantage to the threatener, or to compel some other act against the victim's will. MCL 750.213; *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). Judge Kerwin found that Darrisaw and the

other defendants aided and abetted each other in the commission of the crimes. The evidence supports this finding. Although the adult victim did not state that Darrisaw communicated a threat to harm her or her child with the intent of gaining money and valuables, Darrisaw's conduct during the offense was clearly intended to support McCord's threats. There was evidence that Darrisaw approached the adult victim with a gun, rode with the others to the garage, and helped hold the children captive while the adult victim got the money. A trier of fact could find that this was a cooperative effort among the four men to threaten the adult victim's niece and infant son with harm in order to induce her to give them money and jewelry. Additionally, although Darrisaw did not utter the threat, he made the threat plausible and imminent by keeping the baby in a secret location while the adult victim procured the valuables. Furthermore, the adult victim testified that Darrisaw told her when he first approached that no one would be hurt if she cooperated. Darrisaw thus initiated the kidnapping and extortion by implicitly threatening the adult victim and the children with harm unless she did the kidnappers' bidding.

Defendant Walker contends that the evidence was insufficient to support his conviction. Despite the inconsistencies, both eyewitnesses testified that Walker played a significant role in the carjacking and kidnapping, and that he was acting in concert with the others in extorting money and valuables. The evidence was sufficient to support Judge Kerwin's finding that Walker and the others aided and abetted each other in the commission of the crimes. *Smielewski*, *supra*, 235 Mich App 207; MCL 767.39.

Walker repeats, verbatim, Barclay's arguments that the trial court's findings were inadequate and that the trial court erred in finding that the adult victim was a credible witness. Our analysis and rejection of Barclay's arguments on this issue apply with equal force here. Walker also argues that he should be granted a new trial because the verdict was contrary to the great weight of the evidence. This claim is without merit. Walker contends that the adult victim's identification of him was unreliable when considering the factors of *Gray* and *Kachar*, *supra*, but we have already considered and rejected this argument in our prior discussion of Darrisaw's similar argument. Walker also relies on *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), for his argument that the evidence preponderates against the verdict because the witnesses' contradictions of each other severely undermined their credibility. We disagree. The Court in *Lemmon* held that reversal is warranted in only very narrow circumstances, which we conclude are not present here. *Id.*, 456 Mich 642-644.

Finally, Walker argues that his waiver of a jury trial was invalid because the trial court failed to comply with MCR 6.402(B). The trial court's determination that a defendant validly waived his right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). However, because Walker failed to raise this issue below, we review this matter for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Walker claims that the trial court failed to ascertain, by addressing him personally, that he understood his right to a jury and voluntarily chose to waive that right. We find, however, that the trial court's question, "is it your desire to waive a trial by jury also on these matters," was sufficient to ascertain that Walker desired, i.e., voluntarily opted, to waive his right. Although the trial court did not specifically ask Walker whether he understood his right to a jury trial, the trial court explained to Barclay and Walker that they had the right to a trial by jury.

Furthermore, Walker has not made any showing that he did not understand his rights, or that he acted involuntarily. He has therefore failed to establish a plain error, or that his substantial rights were affected. *Carines, supra*, 460 Mich 763; *People v Taylor*, 245 Mich App 293, 305 n 2; 628 NW2d 55 (2001).

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs